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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/716,378	11/18/2003	John R. Schiltz	MKAY:032US/10310699	4382
32425	7590	05/01/2008	EXAMINER	
FULBRIGHT & JAWORSKI L.L.P. 600 CONGRESS AVE. SUITE 2400 AUSTIN, TX 78701			LANDAU, SHARMILA GOLLAMUDI	
		ART UNIT	PAPER NUMBER	
		1611		
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		05/01/2008	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/716,378	SCHILTZ, JOHN R.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Sharmila Gollamudi Landau	1611	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 22 January 2008.
- 2a) This action is **FINAL**.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1,4,6,7,17-24,28,30-33 and 41-52 is/are pending in the application.
- 4a) Of the above claim(s) 21-24,28,30-33 and 41-48 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1, 4, 6-7, 17-20, 49-52 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ .                                    |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____.   | 6) <input type="checkbox"/> Other: _____ .                        |

## **DETAILED ACTION**

Receipt of Amendments and Remarks filed 1/22/08 are acknowledged. Claims 1, 4, 6-7, 17-24, 28, 30-33, 41-52 are pending in this application. Claims 1, 4, 6-7, 17-20, 49-52 are directed to the elected invention. Claims 21-24, 28, 30-33, 41-48 are directed to a non-elected invention and species. Note that claims 45-46 have been amended to read on non-elected species.

### ***Claim Rejections - 35 USC § 112***

**The rejection of claims 10-11, 14, 16 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention is withdrawn in light of the amendments of 1/22/08.**

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
- (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

**Claims 1, 6-7, 17-20, 51 are rejected under 35 U.S.C. 102(e) as being anticipated by Wechter et al (7,235,397).**

Wechter discloses a solid powder composition comprising (a) about 1.2% glucose, (c) about 4.85% L-methionine, (b) about 4.85% N-acetyl glucosamine, and (d) about 0.048% sodium bicarbonate, among other ingredients. The solid composition is then mixed with water to

provide a solution. See example 1. Note the recitation, “the composition is formulated as a cosmetic blend” is a recitation of intended use which does not impart a structural limitation and thus is not given patentable weight. Note claims 7-9 are directed to the intended use of the composition and are not given patentable weight since they do not impart a structural limitation.

***Response to Arguments***

Applicant argues that it appears that the “cultural medium” disclosed by the prior art is formulated in to a solution. Applicant argues that the medium is used to culture a bacterial organism. However, the instant invention is directed to a topical skin care composition that comprises glucose, glucosamine, at least one essential amino acid, and sodium bicarbonate. Applicant argues that the composition is a cream, a lotion, an anhydrous base, or an emulsion. Thus, Wechter does not disclose skin care creams, lotions, anhydrous bases, and emulsions which are structural limitations in claim 1.

Applicant's arguments filed 1/22/08 have been fully considered but they are not persuasive. Applicant's attention is directed to Table I of US '397 which discloses a composition comprising the required elements glucose, glucosamine, at least one essential amino acid, and sodium bicarbonate. Further, applicant's attention is directed to column 21, line 17 wherein Wechter discloses that Table 1 comprises solid components. Thus, clearly the composition is a solid powder. This intermediate product reads on the claimed "anhydrous base" which may be a powder as claimed in dependent claim 6. Regarding, the intended use, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In instant

case, the recitation “topical skin care” does not provide patentable weight since it does not impart a structural limitation. The prior art discloses the same composition in the same claimed form and it is non-toxic. Thus, the composition is capable of being applied to the skin.

**The rejection of claims 1-3, 5, 7-9, and 12-14 under 35 U.S.C. 102(b) as being anticipated by De Labbey et al (5,648,069) is withdrawn in light of the amendments filed 1/22/08.**

**The rejection of claims 1-4, 7-14, 17-20 under 35 U.S.C. 102(b) as being anticipated by Oleniacz et al (3,957,971) is withdrawn in light of the amendments filed 1/22/08.**

#### ***Claim Rejections - 35 USC § 103***

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Claims 1, 4, 7, 17-20, 49-50, 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oleniacz et al (3,957,971) in view of Joiner (5,037,648).**

Oleniacz teaches moisturizing units that are incorporated into a moisturizing composition to treat chapped, dry skin. The composition improves the softness, plasticity, and flexibility of water-deficient stratum corneum. The composition comprising (a) about 0.97% glucose, (b)

about 0.088% glucosamine, (c) about .01% leucine, and (d) 4.2% aspartic acid, among other components in the claimed range. This mixture is incorporated into liposomes and further incorporated into a moisturizing composition comprising components such as mineral oil, petrolatum, glycerin, stearic acid, and potassium stearate. The composition may be in the form of a lotion or cream (emulsion). See example 19.

Oleniacz does not teach the use of sodium bicarbonate.

Joiner teaches a skin conditioning composition in the form of a lotion or cream that is applied to the skin to improve the condition of the skin. See abstract. The sodium bicarbonate is used in an amount of 1.3%. See examples. The composition further comprises an emollient such as mineral oil and petrolatum and humectants such as glycerin. Joiner teaches the bicarbonate ions bond to the acidic, dry, rough skin surface along with the replacement oil to provide a smooth healthy surface. see column 2, lines 60-67.

It would have been obvious to one of ordinary skill in the art at the time the invention was made the teachings of Oleniacz et al and Joiner and further incorporate sodium bicarbonate into Oleniacz's composition. One would have been motivated to do so with a reasonable expectation of success since Oleniacz teaches a moisturizing composition to treat dry skin and Joiner teaches sodium bicarbonate improves and drug, rough skin along with an emollient such as those taught by Oleniacz. Therefore, a skilled artisan would have been further motivated to add sodium bicarbonate to the composition taught by Oleniacz for an additive effect of treating dry skin. "It is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been

individually taught in the prior art.” In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980).

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sharmila Gollamudi Landau whose telephone number is 571-272-0614. The examiner can normally be reached on M-F (8:00-5:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Sharmila Gollamudi Landau/  
Primary Examiner, Art Unit 1611